



July 19, 2019

**Ex Parte**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street SW  
Washington, DC 20554

***Re: Expanding Flexible Use of the 3.7 to 4.2 GHz Band, Order and Notice of Proposed Rulemaking, GN Docket No. 18-122***

Dear Ms. Dortch:

On July 17, 2019 Michael Calabrese, representing the Open Technology Institute at New America (OTI), met with Aaron Goldberger, Wireless Legal Advisor to Chairman Ajit Pai, concerning the above-listed “C-band” proceeding.

With respect to the underutilized mid-band spectrum at 3700-4200 MHz, I summarized the proposal for a public auction that OTI included in its July 3 Public Notice comments.<sup>1</sup> I reiterated that the Public Interest Spectrum Coalition and diverse industry parties have shown that a private auction or sale would violate Section 309(j) of the Communications Act and willfully ignore Congressional intent and precedent. The Commission has no legal authority to authorize, let alone oversee, a private auction. General provisions such as Sections 303(c), 303(r) and 4(i) cannot possibly provide the authority for a public or private auction that is not consistent with the explicit provisions of Section 309(j).

OTI’s proposal – also summarized in the recent letter from four broad-based coalitions to Congressional leadership<sup>2</sup> – is that the most straightforward option consistent with the Commission’s statutory authority is a traditional public auction. Rather than a novel, opaque and unlawful private auction, the Commission has clear authority to rapidly authorize a traditional clock auction that consolidates FSS incumbents into the upper portion of the band, that requires auction winners to reimburse incumbents for any eligible and reasonable costs, and that modifies FSS space station licenses and earth station registrations accordingly.

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<sup>1</sup> Comments of the Open Technology Institute at New America, Public Notice, *Expanding Flexible Use of the 3.7 GHz Band*, GN Docket No. 18-122 (July 3, 2019).

<sup>2</sup> Letter from Public Interest Spectrum Coalition, Dynamic Spectrum Alliance, Broadband Connects America Coalition, and Schools, Health, Libraries Broadband Coalition to the chairs and ranking members of Senate Commerce and House Energy & Commerce Committees (July 9, 2019), available <https://tinyurl.com/y3huz8zr>.

Prior to an auction, the Commission can appoint an *Independent* Transition Facilitator (ITF) with a duty to collectively represent the winning bidders, as well as to protect earth stations that will need to be retuned or replaced. The ITF can – in the period leading up to a 2020 auction – submit a Transition Plan that estimates the post-auction costs that will be shared by winning bidders (on, for example, a MHz/pop basis).

The courts have consistently upheld the Commission’s authority to reorganize bands, modify licenses, and authorize mechanisms that reimburse incumbents’ costs. In the past, when the Commission addressed similar opportunities to consolidate or relocate incumbents in an underutilized band, it relied on a traditional auction (where needed) and required winning bidders or other entrants to assume the cost of relocating incumbents whose licenses are modified to ensure “comparable facilities” on different frequencies. There is strong precedent from multiple prior proceedings to support license conditions that require winning bidders to shoulder the costs of relocating FSS incumbents and to voluntarily negotiate reasonable premium payments, as needed, to incumbents in exchange for expedited clearance.

I noted as one example the framework the Commission adopted when it subdivided the 18 GHz band which, like C-band, was occupied on a co-primary basis by FSS and FS users.<sup>3</sup> More recently the Commission established rules in 2006 that required compensation for relocated Fixed Service and Broadband Radio Service incumbents through a clearinghouse paid for by new Advanced Wireless Service licensees.<sup>4</sup> Similarly, in 2013 the Commission required winning bidders in the Upper H Block auction to make proportional payments into a fund previously established to pay the costs of clearing incumbents from the overall H Band.<sup>5</sup>

Finally, I noted the broad support for coordinated sharing of unused spectrum across all of C-band for P2MP fixed services, as proposed by the Broadband Access Coalition, among rural broadband ISPs and advocates, tier-two carriers with CAF obligations, technology companies represented by the Dynamic Spectrum Alliance, as well as other parties that support more intensive use of the band to narrow the rural broadband divide.

Respectfully submitted,

/s/ *Michael Calabrese*

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cc: Aaron Goldberger

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<sup>3</sup> *Redesignation of the 17.7-19.7 GHz Frequency Band, Blanket Licensing of Satellite, etc.*, Report and Order, IB Docket No. 98-172 (rel. June 22, 2000). See *Teledesic LLC v. FCC*, 275 F.3d 75, 86 (D.C. Cir. 2001) (upholding FCC authority to require satellite operators to negotiate the payment of relocation costs of FS incumbents moved to the upper portion of the heretofore co-primary 18 GHz band).

<sup>4</sup> See *Amendment of Part 2 of the Commission’s Rules to Allocate Spectrum Below 3 GHz for Mobile & Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Systems*, Ninth Report & Order, 21 FCC Rcd 4473, at 4513-19, 4526-33 (2006); see also 47 C.F.R. §§ 27.1160-27.1174; 47 C.F.R. §§ 27.1176-27.1190; 47 C.F.R. §§ 27.1230-27.1239.

<sup>5</sup> See *Service Rules for Advanced Wireless Services H Block — Implementing Section 6401 of the Middle Class Tax Relief and Job Creation Act of 2012 Related to the 1915-1920 MHz and 1995-2000 MHz Bands*, Report and Order, 28 FCC Rcd. 9483, 9546-9550 ¶¶ 167-173 (2013).